IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 609 OF 2002.

Deshmukh & Co.(Publishers) Pvt.Ltd.,
a Company incorporated under the
Indian Companies Act, 1956 and
having its registeered office at
473, Sadashiv Peth, 'Savali',
Pune- 4110-30, through its Director
Shri Girish Vinayak Dange,
Age about- 40 years,
Occu:Business, r/o 37/2/13,
Yashashri, Pune- 411038. Appellants.
(Ori.Plaintiff)

vs.

1.Avinash Vishnu Khandekar
age about 65 years
occupation retired
residing at "Usha"
Plot No.47,Pratibhanagar
Kolhapur.

2.Smt. Mandakini Khandekar.
age about 64 years,
occupation retired
residing at "Nandadeep"
5th Lane, Rajarampuri
Kolhapur.

3.Smt. Supriya Pendharkar.
Age about 57 years, residing
at "Kadambari" Plot No.98/1
Ward No.6, Ambarnath (E),
Thane.

4.Smt. Surekha Atul Kapdadi
Age about 58 years, residing at
"Ashish", Subhashnagar,
Kolhaplur.

5.Smt. Kalpalata Khare.
Age 61 years, residing at
2113, Shilpayatan Aprt.
Pune.

6.Sunilkumar Lawate.
Age about 45 years,residing
at Nishankar, Kolhapur.

7.M/s Mehta Publishing House.

8.Anil Mehta
Age about 60 years, residing
at 2349, Shanivar Peth,
"C" Ward, Kolhapur.

9.M/s Pressograph Printers. .. Respondents.
(Ori.Defts.)

WITH

FIRST APPEAL NO. 276 OF 2001

Deshmukh and Company (Publishers)
Private Limited, a Company
registered under the provisions
of the Companies Act, 1956 and
having its office and place of
business at 473, "Savli"
Sadashiv Peth, Pune ..... APPELLANT
(ori.plaintiff)

VERSUS

1. Shri Anil Mehta
aged about 55 years,occupation
publisher, residing at
1216, Sadashiv Peth
Near Perugate,
Pune- 411 030.

2. Ms.Mandakini Khandekar
age about 64 years,
occupation retired
residing at "Nandadeep"
5th Lane, Rajarampuri
Kolhapur.

3. Avinash Khandekar,
Age about 65 years,
Occ: Retired, residing
at "Usha", Plot No.47,
PratibhaNagar, Kolhapur.

4. Mrs.Lata Khare
age about 61 years,
occupation housewife
residing at 3/13, Shilpayatan
Apartments, Karve Road
Erandwane, Pune 411 004.

5. Mrs.Sulabha Kapadi
age about 59 years,
occupation housewife
residing at C/o Atul Kapadi
"Ashish" 21/1, Vishwas
Society, Subhashnagar
Kolhapur.

6. Mrs.Mangala Pendharkar
age about 57 years,
occupation housewife
residing at "Kadambari"
Plot No.98/1, House No.831
No.6 Sai Action
Ambarnath (E).

7. Mehta Publishing Company
a firm carrying on business
of publication of books at
1216, Sadashiv Peth, near
Perugate, Pune 411 030
through its proprietor/partner
Respondent No.1 above) ... RESPONDENTS
(Ori.Defts.)

Dr. V.V.Tuljapurkar, Senior Advocate, i/b S/Shri R.G.Ketkar and S.G.Karandikar, Advocates, for the appellant.

Mrs. Kalyani Pathak, Advocate with Mrs. Madhavi Deshpande i/b Shri Uday Warunjikar, Advocate, for respondent nos. 1 to 7.

CORAM : V.C.DAGA, J

RESERVED ON: 29.4.2005

DELIVERED ON: 4.5.2005

JUDGMENT :

. The unsuccessful plaintiff in the Court below in the suit claiming copyright in the Literary work of late Shri V.S. Khandekar is the appellant herein. The substantive First Appeal is directed against the judgment and decree dated 3.2.2001 in Civil Suit No. 2 of 1998 passed by the learned Third

Additional District Judge, Pune, whereby the suit filed by the appellant came to be dismissed, whereas Appeal from Order is against the order dated 20.2.2002 passed below Ex.5 in Copyright Suit No.2 of 2002 by the Vth Additional District Judge, Pune, whereby interim injunction came to be refused.

. The parties are same, issues involved are identical, facts are common, so a single judgment will dispose of both appeals. Hereinafter parties will be referred to as arrayed in the original suits.

The Factual Matrix :
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1. The factual matrix giving rise to the present appeals in nutshell can be summarised as under:

2. M/s.Deshmukh & Company Publishers (P) Ltd. Pune, a leading publisher of books; carrying on business at Pune, filed a suit under Section 62 of the Copyrights Act, 1957, inter alia, claiming - (i) a declaration that the plaintiff (appellant herein) has a subsisting copyright in publication of 14 books mentioned in the Schedule annexed to the plaint; with (ii) negative declaration that none of the defendants has any right to print or publish the same during the subsistence of the copyright in its favour; with

(iii) a further decree for permanent injunction; to restrain the respondents - defendant Nos.2 to 6 from dealing with, transferring, destroying or printing or publishing or otherwise authorising others from publishing or printing or selling or otherwise dealing with the books listed in the Plaint Schedule in any manner whatsoever. In addition, the plaintiffs have also claimed compensation in the sum of Rs.10,000/-.

3. The respondent No.1 herein is also a publisher of the books, whereas the respondent Nos.2 to 6 are the legal heirs of well known Marathi literary figure late Shri V.S.Khandekar, who had won "Gyanpeeth Award" for his literary work; crowned with a very distinguished honour for his literary work in the Marathi language. He was a person of very high repute.

4. The plaintiff's case is that Shri Ram Jayawant Deshmukh was a publisher based at Pune. He was carrying on his proprietary business of publishing books in his own name. He had published books / literary work of late Shri V.S.Khandekar for several years since 1939 or so. On 19.5.1974 late Shri V.S.Khandekar entered into a written agreement with Late Shri R.J.Deshmukh under which exclusive publishing rights of his books were given to him. Shri V.S.khandekar left for heavenly abode on 2.9.1976 leaving behind his 'Will' under which another literary

celebrity and well known author Shri Ranjeet Desai was appointed as Executor of his Will.

5. The respondent No.2 to 6 herein, legal heirs of late V.S.Khandekar; after his death had raised a dispute in the company of Shri Ranjeet Desai, an executor of the Will of late Shri V.S.Khandekar, who had strain relations with late Shri Ram Jaywant Deshmukh. As a result, the first litigation by way of civil suit being Civil Suit No.1174 of 1981 came to be filed against Shri Deshmukh and his proprietorship firm (At the relevant time plaintiff-Company was not in existence) in the Court of Civil Judge, Junior Division, Kolhapur, alleging that heirs of Late Shri V.S. Khandekar had revoked the said agreement dated 19.5.1973 and claimed declaration to that effect and also claimed relief of injunction against Shri R.J. Deshmukh. Shri Deshmukh expired on 2.6.1985. Mrs. Sulochana Deshmukh was brought on record as his legal representative. The said suit was dismissed. However, certain directions to delete some part from the autobiography of Shri V.S.Khandekar, "Eka Panachi Kahani" were given by the trial Court and permanent injunction to that limited extent was issued.

6. The aforesaid Decree passed in Civil Suit No.1174 of 1981 was assailed in Regular Civil Appeal No.40 of 1989 filed in the District Court at Kolhapur.

The said appeal was partly allowed by the learned Additional District Judge, Kolhapur by judgment and order dated 11.2.1991 under which the defendants were restrained by perpetual injunction from printing, and/or publishing or getting printed and/or published sixty books of late Shri V.S.Khandekar since those books were not published during the stipulated time frame prescribed in the agreement however, with respect to 13 books which were published within time frame permanent injunction to print and publish came to be refused. The said suit with respect to other twelve books came to be dismissed. So far as another book 'Eka Panahi Kahani' is concerned, the decree of the trial Court was confirmed. In other words, it was held that the defendants had lost their right to publish 60 books except twelve + one mentioned in the decree; The present dispute relates to the nature of rights of the publisher with respect to the said excluded twelve books together with one more book viz. " Sonerin Swapna Bhangaleli" which does not find place in the agreement dated 19.5.1973.

7. As per plaint allegations, Late Shri R.J. Deshmukh, as per his will had bequeathed all his property to his wife Mrs.Sulochana Deshmukh, who later on, formed and incorporated the plaintiff company in the year 1989 and transferred all her publishing rights in the books of late Shri V.S.Khandekar in

favour of the plaintiff Company vide written document dated 12.3.1996. Based on this document, the plaintiff-appellant herein claimed exclusive publishing rights with respect to fourteen books referred to hereinabove. In order to assert their right they filed a civil suit to claim reliefs prayed therein, the details of which are mentioned in para-2 (supra).

8. The respondent No.2 (defendant No.1) Anil Mehta, who is the proprietor of defendant No.7- firm, is also engaged in publishing business and claimed to have obtained Power of Attorney from defendant Nos.2 to 6 to represent their interest in the suit. He tried to publish and print 14 books set out in the schedule to the plaint i.e. the books spared or excluded in the judgment and decree passed in Civil Suit No.1174 of 1981 by the learned Civil Judge, Junior Division, Kolhapur, as modified in Regular Civil Appeal No.40 of 1989 by the learned Additional District Judge, Kolhapur.

9. On being summoned, the defendants appeared in the suit. Anil Mehta and Mehta Publishing Company, defendant Nos. 1 and 2 respectively filed their written statement. The very same written statement was adopted by the other defendants vide their purshis dated 27.4.2000 (Exhibit 36). They denied rights

claimed by the plaintiff in literary work of late Shri V.S.Khandekar. It was denied that the plaintiff inherited or received any such right either from late Shri R.J. Deshmukh or his wife late Mrs.Sulochana Deshmukh as pleaded in the plaint. The interpretation on the agreement dated 19.5.1974 put by the plaintiff was challenged on various grounds. It was also contended that late Shri R.J. Deshmukh or his wife or person claiming through them did not fulfil their obligations flowing from the agreement dated 19.5.1973. That they not only failed to pay amount of royalty to the heirs of late Shri V.S. Khandekar or to the executor of his will, as agreed but also failed to supply copies of the books on its publication as agreed and did not even render any account about such publication work. The defendants thus prayed for dismissal of suit.

10. The trial Court was pleased to frame issues relevant to the pleadings and permitted the parties to lead their respective evidence.

11 On the basis of the documentary and oral evidence available on record, considering various clauses of the agreement trial Court was pleased to hold that the said agreement had conferred upon the publisher late Shri R.J.Deshmukh a mere licence to publish books written by late Shri V.S. Khandekar.

Trial Court in support of its findings mainly relied upon judgment of the M.P. High Court in the case of Mishra Bandhu Karyalaya vs. Shivratanlal Koshal (AIR 1970 MP 261). The trial Court in unequivocal terms held that the agreement in question was nothing but a simple licence granted to print and publish certain subject books on certain conditions as mentioned in the agreement subject as to the payment of royalty stipulated therein. The trial Court also relied upon the admission given by the publisher Shri Deshmukh in one of the books of late Shri V.S. Khandekar published by him known as "Yayati" on 6.7.1976. The front page of the book carried following endorsement:

" "

(All rights are with the author)

The trial Court was, thus, pleased to hold that the plaintiff has failed to prove exclusive right to publish Marathi literature of late Shri V.S. Khandekar with respect to 14 books mentioned in the plaint schedule based on agreement dated 19.5.1973. It was thus held that plaintiff was not entitled to a declaration and permanent injunction as prayed for in the said suit. The suit accordingly came to be dismissed.

13. One more litigation tagged with this appeal also needs brief reference. The plaintiff-appellant herein has also instituted one more litigation being Copy Right Suit No.1 of 2002 in the District Court, Pune, for declaration and injunction. Declaration that the plaintiff-company (Appellants) as an assignee of Smt. Sulochanabai Deshmukh has absolute right to print and publish the and published work together with unedited unpublished writings of late Shri V.S. Khandekar and also prayed for permanent injunction pursuant to various prayer clauses incorporated in the suit. During the pendency of the suit, plaintiff-appellant moved an application for interim injunction (Exh.5). On contest the trial Court vide its order dated 20.2.2002 was pleased to reject prayer for interim relief holding absence of prima facie case, balance of convenience and possibility of suffering any legal injury.

14. Being aggrieved by the aforesaid judgment and decree in Civil Suit No. 2/98, dated 3.2.2001, and the order of the trial Court refusing to grant prayer for injunction (Ex.5) in Copy Right Suit No.1/2002 vide order dated 20.2.2002 the appellants herein; has preferred these appeals to challenge the above verdicts of the trial Court delivered in both proceedings.

Submissions :
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15. Dr.Virendra V. Tulzapurkar, learned Senior Counsel appearing for the appellant- original plaintiff, submitted that the document dated 19.5.1973 is a deed of partial assignment. That it is not a mere licence to print and publish books. In support of his contention, he has referred to and relied on following amongst other clauses of the agreement the gist of which is as under:-

(i) right to publish books given to Shri R.J. Deshmukh;

(ii) if the books are not published within a period of five years that right will be reverted to the author;

(iii) the author retains the right of translation or making film or play on the basis of said books, and

(iv) after the death of Shri R.J.Deshmukh, rights under the agreement would devolve as per his will.

According to him, clause (iv) supra providing for devolution of rights under the agreement as per his will is sufficient to show that the rights given under the agreement were not mere personal rights but were heritable and transferable. According to him, above clause (iv) of the agreement is inconsistent with the concept of a licence.

15. Dr.Tulzapurkar would further submit that copyright is a bundle of rights as enumerated in Section 14 of the Copyright Act, and, therefore, there was no need to provide for various rights retained by the author in the agreement; if it was only a licence. According to him, section 18 of the Act recognises the owner's right to assign copyright either wholly or partially. In his submission, an assignment creates an interest of ownership in favour of the assignee, whereas, a license merely permits a licensee to do something which but for the licence would amount to violation of the owner's rights. In support of his submission he relied upon the decisions in (i) **British Actors Film Co. vs Glover** (1918) 1 KB 299 at p.306 and (ii) **Heap vs. Harley** (18 89) 42 Ch.D. 461 at page 470).

16. Dr. Tulzapurkar urged that mere use of the term "Licensor or Licensee or Licence" by itself does not determine as to whether or not the instrument

is a licence. According to him, reservation of certain rights in the agreement provision for reverting back to the author of the rights granted by the agreement show that the agreement is nothing but assignment and not a licence. He pressed into service various decisions viz. (i) **Messager vs. British Broadcasting Co.Ltd** (1929 Appeal Cases 151); (ii) **Loew's Incorporate vs. Littler & Ors.** (1958) (2) All England Reports, 200; (iii) **Jonathan Cape Ltd v. Consolidated Press Ltd** (1954) (3) ALL ER 253; and (iv) **Dharam Dutt Dhawan vs. Ram Lal Suri & Sons** (AIR 1053 Punjab 279). He also relied upon the decisions in (i) **William Butler Yets v. Prof.Eric Dickson** (AIR 1938 Lahore 173) and (ii) **Asia Publishing House vs. John Wyley & Sons** (71 Bom Law Reporter 777).

17. On the second issue, Dr. Tulzapurkar would submit that the trial Court is clearly in error, inasmuch as, the decision in the earlier suit could never operate as constructive res judicata for the simple reason the issue as to whether the agreement was a copyright or a licence was not in issue in the earlier suit. In any event, the question as to whether or not Shri R.J.Deshmukh was the owner by way of copyright; could not have been decided in the earlier suit as the said Court had no jurisdiction to decide that question. Thus, he would submit that both the issues ought to have been answered in favour of

the appellant and the suit ought to have been decreed with costs.

18. Per contra : The learned Counsel appearing for the respondents while refuting the submissions made by Dr.Tulzapurkar urged that the agreement dated 19.5.1973 was nothing but a mere licence to publish books in favour of late Shri R.J. Deshmukh. It was not an assignment of a copyright. While developing this submission the learned Counsel for the respondents would submit that the entire plaint of the suit if perused would show that it nowhere raises a contention that the agreement in question is an assignment of copyright. In her submission, entire agreement is silent about the term 'copyright' as such, it is, required to be treated as a mere publishing licence; that too a conditional personal licence in favour of Late Shri R.J. Deshmukh. It did not create any permanent right in his favour. It was revocable at the wish and will of the grantor.

19. According to the learned Counsel for the respondents, at no point of time, the intention of the parties to the suit agreement was to create any copyright in favour of late Shri R.J. Deshmukh or his legal heirs. The learned Counsel for the respondents relied upon the decisions in (1) AIR 1970 M.P. 261

(para 22), AIR 1938 Lahore 173 and AIR 1970 MP 261 (para 16) in support of her submission.

20. The learned Counsel for the respondent would further contend that if the intention of the parties to the agreement is gathered, it is clear that payment was to be made with the publication of each edition by sharing the profit by way of royalty by way of consideration, as such there was a continuous obligations on the part of the publisher to make payment of royalty with obligation to render accounts even to the heirs of late Shri V.S. Khandekar. In this view of the matter, she submits that the agreement in question has to be construed merely as licence to publish books and no more. In support of this submission, reliance was placed on clauses 5 and 6 of the agreement.

21. Learned Counsel for the respondent further contends that para 3 of the agreement provides that, if Shri R.J. Deshmukh does not publish books within a period of five years or refuses to publish, then, the publishing rights would revert back to heirs of late Shri V.S. Khandekar. This term, in the submission of the learned Counsel, had only given publishing rights in favour of late Shri R.J.Deshmukh. She would further submit that late Shri R.J.Deshmukh himself during his lifetime had admitted that he did not have

copyright, which in her submission, is clear from the first page of book "Yayati" published by him on 6.7.1976, which specifically says that " all rights reserved with the author".

22. The learned Counsel for the respondent has also pressed into service para 10 of the written statement (Ex.71) which was filed by Shri R.J. Deshmukh in Kolhapur Court in Regular Civil Suit No.1174 of 1981 and submitted that even according to Shri Deshmukh, late Shri Khandekar had granted only right to print and publish his literature during his life time. In her submission, this can also be inferred from the averments made in para (2) of Civil Appeal No. 1280 of 2001 and para (16) of the affidavit in rejoinder filed by Shri R.J. Deshmukh in the said appeal. In other words, according to the learned Counsel, even Shri R.J. Deshmukh during his life time never claimed any copyright or exclusive licence in his favour. According to her, the learned Additional District Judge, Kolhapur, has clearly recorded a categorical finding in para (43) of his judgment (Ex.87) that "no copy right was transferred in favour of Shri R.J. Deshmukh in terms of the agreement." In her submission, this categorical finding is very much binding on both the parties and operates as res judicata between them.

23. The learned Counsel for the respondents would further contend that assuming but not admitting that the suit agreement had created copyright in favour of late Shri R.J. Deshmukh, since the company did not apply for registration of said copyright under section 45 of the Copyright Act, as such non-registration of the copyright must lead to a conclusion that the plaintiff is not entitled to use the same. Reliance is placed on **Mishra Bandhu Karyalaya v. S.Koshal** AIR 1970 MP 261 (paras 9 and 10) in support of the submission made.

24. Lastly, the learned Counsel for the respondents by way of alternate submission contended that the suit agreement automatically came to an end with the demise of Shri R.J. Deshmukh, as, he did not nominate or appoint any person, so as to transfer his right under the suit agreement after his demise. Alternatively, it is submitted that wife of Late Shri R.J. Deshmukh did not comply with any of the obligations flowing from the agreement. She did not pay a single pai to the heirs of late Shri V.S.Khandekar and that the document dated 12.3.1996 transferring rights to print and publish in favour of the plaintiff company by Sulochanabai is a suspicious document. The learned Counsel for the respondents thus prayed for dismissal of the appeals with costs.

25. In rejoinder, Dr.Tulzapurkar, submitted that in para 14 of the plaint it was specifically averred that the plaintiff is claiming copyright. The suit which was filed in the Court inferior to the District Court was withdrawn so as to file it in the Court competent to try a suit relating to copyright. In any case, both the parties proceeded on the footing that the claim put forth by the plaintiff-appellant was for copyright. In his submission, the issues framed by the trial Court also clearly demonstrated that both the parties were aware that the plaintiff-appellant was claiming copyright under the agreement. He, thus, contends that now it is too late for the respondents to urge that there were no proper pleadings to claim copyright. In his submission, the contentions in this behalf are devoid of any substance.

26. Dr.Tulzapurkar also strongly refuted the contention of the respondents that the suit agreement was a personal licence granted in favour of Late Shri R.J. Deshmukh and it came to an end with his demise. He submits that four clauses of the agreement referred to in para 15 (supra) clearly indicated that it was a partial assignment of copyright providing for devolution of rights on the heirs of Shri R.J. Deshmukh. It is also submitted that payment of royalty periodically and not a lumpsum amount is not

determinative of the factor whether the agreement is an assignment or a licence. In his submission, judgments relied upon by the respondents are, thus, clearly distinguishable.

27. So far as third contention of the respondents that in one of the books published by Shri R.J.Deshmukh contained a declaration that the copyright belonged to the author, Dr.Tulzapurkar submits that such an inscription was for the information of general public that if any member of the public desired to deal with the said book for exploiting any other copyright it is the author who was required to be contacted.

28. The learned Counsel for the appellant, in reply to the contention of the respondents that the will of late Shri R.J.Deshmukh did not grant any rights in favour of his wife, submitted that entire estate had been bequeathed by Shri Deshmukh to his wife Mrs.Sulochana. The author had accepted and recognised the right of Shri R.J.Deshmukh to bequeath the rights given to him. Thus, wife of Late Shri R.J.Deshmkuh was legally entitled to inherit and transfer those rights in favour of the plaintiff-company.

29. In reply to the contention of the respondents that non-payment of royalty disentitled the appellant from claiming any equitable relief, it is submitted that the said contention is mis-conceived, inasmuch as the assignment was absolute and in any event, alleged non-payment of royalty does not ipso facto result in vitiating the assignment. The claim, if any, of the heirs of the author is only to claim royalty amount and nothing more.

30. Dr.Tulzapurkar, lastly, prayed for allowing the appeal by reversing the judgment and decree of the trial court and prayed for decree in terms of prayers in the suit with an interim injunction in terms of Exh.5 filed in Copy Right Suit No. 1/2002.

Crux of the Issues:

31. The crux of the issues on the pleadings and rival contentions as between the parties are as follows:

Issues	Findings
(1) Whether the plaintiff/ Appellant has proved any right muchless exclusive right to print	-No- (What is established is the licence to

and publish in Marathi work of Late Shri V.S. Khandekar in respect of 14 books as per agreement dated 19.5.1973?	print and publish (non-exclusive) in favour of Late Shri R.J. Deshmukh.
(2) If no, what was the nature of right given under the agreement dated 19.5.1973 executed by late Shri V.S. Khandekar in favour of Shri R.J. Deshmukh. Whether it is an assignment of licence?	Non-exclusive licence in favour of Late Shri R.J.Deshmukh but not in favour of the plaintiiff -company.
(3) Whether the impugned judgment and decree in Civil Suit No. 2/98 dated 3.2.2001 and order dated 20.2.2002 (Ex.J.) passed in Copy Right Suit No.1/2002 is legal and valid?	Yes.
(4) Whether appellant is entitled to claim interim injunction pursuant to the prayer made in application (Ex.5) moved in Copy Right Suit No.1/2002?	No.

Contours of appellate jurisdiction in substantive appeal:

32. Before I go to the points canvassed on behalf of the rivals let me say a few words in relation to the appeal Court's functions. The law provides the remedy of an appeal because of the recognition that those manning the judicial tier too commit errors. A Court of appeal has right and is indeed under an obligation to appraising and conclusions reached by the Court of the first instance so as to set right what are the errors of fact as also of law. Here, a well restraint

which Courts of appeal place upon themselves is the inadvisability of rushing into a substitute a finding in conformity with the material on record, merely because the Court of appeal left to itself or functioning as the Court of the first instance, would have come to a different conclusion. In otherwords, the Court of appeal will not interfere with a conclusion on facts reached by the trial Court simply because it occupies a higher place in the judicial hirarchy. He who come in appeal has to establish that the error on facts is of such a character as to necessitate intervention by the Court of appeal, because the error left uncorrected would constitute a blot on the fair name of justice. (see Panjikaran Paulose Joseph vs Kusum Vithal Patil, 1993 Mah.L.J. 1135).

33. The Apex Court in the case of Madhusudan Das vs. Narayani Bai, AIR 1983 SC 114 has said:

> "The principle is one of practice and governs the weight to be given to a finding of fact by the trial Court. There is, of course, no doubt that as a matter of law, if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjuctures and surmises the appellate Court is entitled to interfere with the finding of fact."

Pleading & Proof:
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34 Before embarking upon the issues, keeping in mind the above parameters of the appellate jurisdiction, let me now turn to the pleading and proof available on record. At the outset, it must be pointed out that in the plaint (Ex.1) available on record nowhere pleads an agreement dated 19.5.1973. What is pleaded is an agreement of 1974. In paragraph (4) of the plaint: while reiterating the said agreement: what has been pleaded in the plaint is the agreement of 1974. Thus, what is pleaded in the plaint is the agreement of 1974 (which does not exists). In other words agreement dated 19.5.1973 has not been pleaded in the plaint.

35. Be that as it may, if one turns to para (6) of the plaint a reference is made to 14 books on the basis of the judgment in Civil Appeal No.40 of 1989; whereas that judgment has dismissed suit with respect to 13 books only. How right in respect of one more book viz." Soneri Swapna Bhangaleli" was claimed is not to be found in the plaint. In para (7) of the plaint there is a reference to the alleged will alleged to have been executed by Late Shri R.J. Deshmukh. However, no date of the said will is to be found in the plaint. It has not been pleaded that it was a last will of Shri R.J.Deshmukh. It is further pleaded in

the very same para that Late Shri V.S. Khandekar devised all the property to his wife Mrs. Sulochanabai Deshmuih. But there is no specific pleading in the plaint as to on what basis the right is being claimed by the plaintiff in the agreement dated 19.5.1973. It is further averred in the plaint that the company was formed in the year 1989 and later on Mrs. Deshmukh by writing granted all her publication rights in the books of Late Shri Khandekar to plainitff-company. However, no details of such writing are to be found in the plaint. No date of the alleged writing is to be noticed in the plaint. It is further stated in the said para that the photocopy of that writing is annexed and marked Annexure C, but the said annexure is not to be seen with the plaint.

36. If one further travels through the plaint pleadings, para 10 of the plaint avers that the plaintiff learnt that defendants Nos. 1 and 7 are about to publish and bring another book namely ‘Yayati" out of 14 books mentioned in the schedule. No date of alleged knowledge, source of information thereof has been disclosed or pleaded in the plaint. No material details or particulars of the facts alleged in this para are to be found in the plaint.

37. In para 11 of the plaint, damages in the sum of Rs.10,000/- are claimed without disclosing any basis

with material particulars or details as to how damages were suffered and on what basis they were calculated. Entire plaint is silent about terms of copyright except in the prayer clause. It is nowhere stated in the entire plaint that the suit agreement dated 19.5.1973 was partial assignment of copyright.

38. The verification of the plaint is also defective. As a matter of fact there is no verification as per O.6 R.15 of the C.P.C. Under the caption of verification; what is done is the "Solomon affirmation". No source of information pleaded in the plaint is to be found in the verification clause. Which paras of the plaint are verified from personal knowledge, which of them are verified from information received have not been mentioned.

39 If one reads the plaint in toto, it is not possible to cull out the cause of action in support of each relief claimed in the suit.

40. Be that as it may, let me consider documentary and oral evidence, brought on record. It appears that vide list of documents (Exhibit 4) dated 13.4.2000, 4 documents were filed by the plaintiff: viz. (i) photo copy of the agreement dated 19.5.1973; (ii) photo copy of the judgment in Reg. Civil Appeal No.40/89 dated 11.2.1991 of the additional District Judge, Solapur

(iii) photo copy of the decree in Re.Civil Appeal No.40/89 and (iv) photo copy of the certificate of incorporation dated 11.5.1989. All these documents came to be exhibited on admission as Ex. 86 to 89 respectively. So far as other documents filed by the defendants vide list Ex.73-A are concerned, they were taken on record and on admission exhibited as Exh.75 to 80.

41. The plaintiff vide Ex.52 filed further documents with list of documents (Ex.73) and produced thereunder photo copies of 18 documents. Advocate for the defendants made endorsement on Ex.52 reading as under:

> "The defendants do not challenge the genuineness of these documents and the signatures thereon,. The formality of proof of these documents be discussed (sic) with.
> Sd/- 6.2.2001"

The trial Court exhibited above 18 documents as Ex.53 to 70 treating the above endorsement as an admission of the documents on the part of the defendants.

42. Let me consider whether or not the above documents are proved. The defendants though dispensed with formal proof of documents filed vide list of documents under Ex.73, but to my mind, they did not admit contents of the documents. Therefore, in my view, contents of the documents filed with list of

documents at Ex.73, ought to have been proved by the plaintiff in accordance with the provisions of the Evidence Act. Perusal and acceptance of the above endorsements, at the most, can be construed as an admission of proof of signatures and genuineness of the documents but not the writing of the body of the documents exhibited as Ex. 53 to 70. In otherwords, concession with respect to formal proof of document does not dispense with necessity to prove truth thereof. Mere no objection to formally exhibit documents neither amounts to an admission of document nor it can be treated as an admission of contents thereof. The only person competent to give evidence on the truthfulness of the contents of the documents is the writer thereof examined before the Court. No such writer was examined. The attempts to prove the contents of the documents by proving the signature has set at nought the well recognised rule that hearsay evidence cannot be admitted. In this view of the matter contents of Ex.53 to 70 cannot be said to have been proved by the plaintiffs.

43. With the aforesaid documents on record, the plaintiff examined one Shri Ravindra Godbole as its witness, who deposed in support of the plaintiffs' case. Relevant portion of the deposition on oath extracted for reference is reproduced hereinbelow.

" On 19.5.1973 Ram Jaywant Deshmukh had entered into an agreement dt., 19.5.1973 with Shri V.S. Khandekar to publish his literature and whereby he had acquired publishing rights of the literally work of Late Shri V.S. Khandekar as far as his Marathi literary work was concerned. After the death of Ram Jaywant Deshmukh, those right to publish the Marathi literary work of shri V.S. Khandekar were assigned to and received by his wife Sulochanabai. Later on Sulochaanabai had assigned these rights. Therefore, now at present plaintiff company holds those rights."

44. Shri Ravindra Godbole has deposed that after the death of Shri R.J.Deshmukh, who had a right to publish Marathi literature of Shri V.S. Khandekar those rights were assigned and received by his wife Smt.Sulochanabai. Reading of this piece of evidence would show that no evidence was led to establish as to how those rights were claimed; under which documents they were acquired by Smt. Sulochanabai, and how they were transferred by her in favour of the plaintiff. Nothing is to be found in this behalf in the oral evidence of Shri Godbole in this behalf. At this juncture, I must mention that both parties to the suit including that of the trial Court proceeded to hear and decide the suit on the incorrect assumption that all the documents were proved on admission, as such, notwithstanding my above findings, I propose to consider this appeal on merits without prejudice to my findings recorded hereinabove, since, in my opinion,

even on merits plaintiff-appellant has no case to succeed even if all the documents and contents thereof taken as proved.

As to Issue No.1:
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45. The resolution of the above issue centers around the written agreement dated 19.5.1973,including the pleadings and the oral evidence led by the plaintiff to claim right to print and publish the work of Shri V.S. Khandekar with respect to 14 books mentioned in the plaint schedule. So far as the existence of proof of agreement dated 19.5.1973 is concerned, its existence, execution and contents having been admitted by the defendants (Exh.4), the said agreement though in the form of photo copy placed on record (Ex.86) can conveniently be read as proved document. Having said so, if one turns to contents of clause 2 thereof it reads as under:

"

(These books are written by Khandekar. The right of printing and getting these books published is given amongst us to party No.2 Mr.R.J. Deshmukh, owner of

Deshmukh & Co.)

46. Reading of the aforesaid clause of the agreement unequivocally goes to show that what was given under agreement was only a right to print and publish. There is no mention of **exclusive** right to print and publish as claimed in the plaint. Thus, written agreement does not give exclusive right. What it gives is bare right to print and publish that too in favour of Late Shri R.J.Deshmukh, not in favour of either Mrs. Deshmukh or plaintiff.

47. Having noticed above, if one turns to the plaint (Ex.1), pleadings in this behalf the same are as under:

> "In the year 1973, and to be exact in May 1974, late Shri Khandekar, who died in the year 1976 had entered into an agreement with R.J. Deshmukh, by which he granted exclusive right to publish his books to the said Deshmukh on certain terms and conditions."

48 Reading of the aforesaid pleadings would go to show that the plaintiff claimed exclusive right of publishing books in the plaint. Right to print is absent from the pleading for want of averments.

49. On the canvas of above pleadings, let me again turn to the oral evidence of Shri Godbole, a sole witness to find out whether or not pleadings in this behalf are proved. The evidence already extracted hereinabove, in para 42 (supra) reads as under:

> "On 19.5.1973 R J Deshmukh had entered into an agreement dated 19.5.1973 with late Shri V.S. Khandekar whereby he has acquired publishing right of the literary work of Shri V.S. Khandekar as far as his literary work is concerned."

50. As already pointed out hereinabove, plaintiff has pleaded in para (3) of the plaint that the late Shri V.S.Khandekar had granted exclusive right to publish his books to Shri R.J.Deshmukh under certain terms and conditions, but while leading evidence no evidence was led in support of the said pleadings. On the contrary, the deponent Shri Godbole (Ex.73) has stated that, "on 19.5.1973 R.J.Deshmukh had entered into an agreement dated 19.5.1973 with late Shri V.S. Khandekar to publish his literature and whereby he had acquired publishing rights of the literary work of Shri V.S. Khandekar". There is no oral evidence to establish exclusive right or claim to print and publish the literary work of the Late Shri V.S.Khandekar as pleaded in the plaint. Omission to depose in support of "exclusive" right to print and publish must lead to the conclusion of non-establishment of exclusive right

to print and publish. The difference between the exclusive and non-exclusive right in the copyright is well known. The absence of evidence in this behalf must negate the claim of exclusive right to print and publish set up by the plaintiff in the suit.

51. It is thus clear that exclusive right which was sought to be claimed in the plaint/suit by the plaintiff has not been established either on the basis of the documents or on the basis of the oral evidence notwithstanding pleading in the plaint in that behalf. Accepting this evidence as a whole, what was acquired under agreement dated 19.5.1973 by Shri R.J. Deshmukh was only right to publish literary work of late Shri V.S. Khandekar but not exclusive right as was sought to be claimed in the suit. Thus, Issue No.1 is answered accordingly.

Issue Nos.2 & 3:

. Both these issues can conveniently be considered together.

Whether Assignment or Licence:

52. In order to decide this issues, it is necessary to understand the basic concept of assignment of copy right and/or grant of licence thereof. Copyright is

multiple rights consisting of a bundle of different rights in the same work. It is seldom that the author of a copyright work himself exploits the work for monetary benefit. Ordinarily, he either assigns the whole or part of his rights to others to exploit economically for a lumpsum consideration. In alternative, he may licence all or some of his rights to others usually on the basis of a royalty payment. An assignment may be general i.e. without limitations or an assignment may be subject to limitations. It may be for the whole term of the copyright or any part thereof. An assignment transfers an interest in, and deals with the copyright itself as provided under section 14 of the Act, but licence does not convey the copyright but only grants a right to do something, which in the absence of licence would be unlawful. An assignment transfers title in the copyright, a licence merely permits certain things to be done by the licensee. The assignee being invested with the title in the copyright may reassign. The licence is personal, and therefore, not transferable or assignable without the grantors' consent. Furthermore, the assignee can sue for infringement without joining the assignor. The licensee cannot sue in his own name for infringement of the copyright, since copyright belongs to the licensor.

53. The copyright comprises of schedule rights

which can be exercised independent of each other. The licence is a personal right which cannot be transferred except in certain circumstances. Licence is a right to do some positive act. Licence is a personal right and creates no more personal obligation between a licensor and licensee. The licence is generally revocable at the will of the grantor. There are different kinds of licences. A licence may be exclusive or non-exclusive; exclusive licence means a licence which confers on licensor or Licensee and persons authorised by him to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copy right in a work. In the case of non-exclusive licence, the owner of copyright retains the right to grant licences to more than one person or to exercise it himself. Licence is a personal right and licensee may not always be entitled to make alterations to the terms. These are broad guidelines. It is difficult to extract from the precedents whether a given transaction is assignment or licence.

54. Section 19 provides for mode of assignment in the manner prescribed therein. Assignment of copy right is valid only if it is in writing and signed by the assignor or by his duly authorised agent. There is no prescribed form of assignment. The assignee to whom certain rights have been assigned by the assignor can be restrained by the Court having competent

jurisdiction. Copyright is not a positive right but is negative right, that is the right to stop others from exploiting the work without the copyright owner's consent or licence. Copyright is kind of personal movable property which can be transferred by assignment etc. transfer inter vivos or by will or by due process of law, i.e. in the event of death of the owner.

55. Sections 18, 19 and 19A of the Copyright Act, deal with Assignment of copyright. Assignment of copyright may be for the whole of the rights or for the part of the rights only. Assignment of copyright may be general i.e. without any limitation being placed on the assignee or assignment may be subject to certain limitations. Assignment may be for full term of copyright or for a limited period of time. Assignment may be on territorial basis i.e. for a particular territory of the country. Copyright can be assigned on different conditions referred to hereinabove.

56. In cases of agreements between authors, publishers and sellers, it is sometimes difficult to determine whether it is an exclusive licence or partial assignment of the copyright to publish and sell. If the agreement contains express words or terms as to copyright then an inference can be drawn. To determine whether a document is an assignment or merely confers a licence, regard must be had to the substance and not to

the form of words used. The question usually arises in the context of whether there has been a partial assignment or an exclusive licence of the right in question. The distinction is a slender but an important one. Different authors have unequivocally expressed that it is difficult to extract from the cases as to whether any given transaction is an assignment or a licence.

57. Let me refer to some of the leading reported cases dealing with the issue in question, which provide some index to answer issue under consideration.

. (1) In Messager v. British Broadcasting Co.Ltd. (1929) AC 151, the author of a French opera sued the BBC for an allegedly unauthorised broadcast.The BBC claimed to have obtained permission from the successor in title to the author's assignee. The disputed transfer was made in 1905 and cl.1 provided that 'the licensor hereby grants the licensee the sole and exclusive rights of representing and performing the play in the UK. Clause 2 provided that the copy right in the music should remain the property of the licensor and by cl.5 all rights of representation reverted to and became the absolute property of the licensor if the licensee fail to produce the play in London within three months of the agreement. The 1905 agreement was held to be an out

and out agreement of the performing rights in the U.K.; in particular the language of cl.5 was more apt to describe the reversion to the licensor of rights which had been assigned by cl.1 than to describe the cessation of licence. So, the document, being an assignment, conferred on the assignee transmissible rights and not merely personal ones.

(2). This was followed in Loew's Inc v Littler (1958) Ch.650) where the agreement conferred the ' sole rights of production of The Merry Widow and also contained a similar reverter clause.

(3). Conversely in Re Clinical Obstetrics (1905-10) MCC 176, an agreement between an author and the publisher gave to the latter ' for the full term of the copyright the whole and exclusive right in all countries to print and publish the work known as Clinical Obstetrics written by and now the property of the author.' The publishers also acquired the sole right of translating the work and publishing the translations. Later clauses deal with the manner of printing, binding, advertising and selling the work. The first clause was held to be ambiguous and as no mention was made of the assigns of the publishers and as several of the provisions showed that the author relied on the discretion and skill of the particular publishers the agreement was held to confer a licence

only.

(4). The same reasonings were followed in Sampson Low & Co. (1923-28) MCC 205, were both prior to the 1911 Act. The divisibility of copyright has to place and classses of acts was not clearly established under the pre-1911 legislation and this may account for the reluctance of the court to treat the agreements as partial assignments. Section 90(2) of the 1988 Act (as did s.36(2) of the 1956 Act and s. 5(2) of the 1911 Act before it) clearly sanctions partial assignments and the court may now be more inclined to regard agreements conferring exclusive rights for the whole copyright period as partial assignments.

(5). In Chaplin v. Leslie Frewin (1996) 1 Ch.71,(1965) 3 All ER 764, it was agreed that the publishers shall during the legal term of the copyright have the exclusive right of producing, publishing and selling the said work in volume form in any language throughout the world'-virtually identical language to that in Clinical Obstetrics- yet the Court held the words were ample and effective to constitute an assignment to the publishers. There was a reference to the publishers' assigns (contrast Clinical Obstetrics) but no reverter clause (contrast Messsager).

(6). In Jonathan Cape Ltd v. Consolidated Press

Ltd. (1954) 3 Al ER 253, (1954) 1 WLR 1313, the author agreed to grant the publishers, their successors and assigns the exclusive right to print and publish in volume form. Other rights such as the serialisation, broadcasting,TV or sound broadcasting rights were to be jointly controlled by the publishers and author. The agreement was held to be a partial assignment of publishing rights in volume form.

(7) In Frisby v. British Broadcasting Corpn Ltd. (1967) Ch 932, (1957) 2 ALL ER 106 an author of a play granted to BBC the exclusive right to televise the play once only within a period of two years from delivery of the script for a certain fee and to televise repeats within a certain limited period for a reduced fee per repeat. The BBC proposed altering a line of the play (which the court found, on the facts, to be a major alteration and the author of the play sought an injunction to prevent the play from being televised in its altered form. It was held that the BBC held under a licence and that the terms of the licence did not authorise it to make major alterations.

58. In Hole vs.Bradbury (1879) 12 Ch.D.886, it is observed that in the agreements between authors and publishers or theatrical products, it is, often difficult to distinguish between and sole and exclusive licence and an assignment of copyright. Where the

agreement between the author and his publisher contains no express term as to the copy right , if consideration is payment to the author of royalties or a share of the profits instead of a sum of money paid down, the inference is that the copyright is not assigned but that a sole and exclusive licence is conferred upon the publisher.

59. Now, let me turn to some of the Indian cases. in Mishra Bandhu Karyalaya v. Shivratan Lal Koshal AIR 1970 MP 261, the High Court held:

> "In the case of agreements between authors and publishers or theatrical producers, it is, often difficult to distinguish between a sole and exclusive licence and an assignment of copyright . Where the agreement between the author and his publisher contains no express term as to the copyright. If the consideration is payment to the author of royalties or a share of the profits instead of a sum of money paid down, the inference is that the copyright is not assigned, but that a sole and exclusive licence is conferred upon the publisher."

Applying these principles in the agreement in question, the High Court was of the view that aforesaid agreement dated 13th March, 1952 (Ex.-P5) created a licence in favour of the defendant from M/s Mishra Bandhu Karyalaya, who thereupon acquired the benefits of a publishing agreement subject to their fulfiling the terms and conditions contained therein. The High Court found to have fortified in this conclusion by the

following observations in Copinger and Skone James on Copyright:

> "But wherever there are continuous obligations on the part of the publisher- for instance, the payment of royalties to the author- the tendency of the Courts is to constitute the agreement as conferring upon the publisher a conditional licence to publish rather than as giving him an equitable title to the copyright."
>
> "It seems to follow from these that upon non-fulfilment of any of the terms which jare essential to the contract itself, the licence was capable of being terminated by reasonable notice."

60. The Court further observed that an assignment carries with it the whole interest in the thing assigned, including the right to re-assign, while licence is personal and not assignable without the grantor's consent. An exclusive licence is a leave to do a thing and a contract not to give leave to anybody else to do the same thing. And it confers no interest or property in the thing but only makes an action lawful which, without it, would have been unlawful. A licensee has no title to sue in his own name, but the assignee, as respects the rights assigned, is treated, for the purposes of this Act as the owner of copyright with all rights which attach to an owner of copyright and can prevent the infringements without any specific clause in the agreement.

61. In the case of K.P. Sundaram vs. M/s Rattan

Prakashan Mandir, AIR 1983 Delhi 461 (at pp.465 to 467), the Court held:

> " It is extremely difficult sometimes to distinguish in case of agreement between authors and publishers and sellers, whether it is an exclusive licence or partial assignment of the copyright to publish and sell. If the agreement contains express words or terms as to copyright then inference can be drawn. Whether the agreement contains no such terms, but the consideration is the payment of royalties or a share of profits instead of down right payment, then the copyright is not assigned. It would be a case of conferment of an exclusive licence to publish and sell."

62. Having examined the above judicial parameters drawn from the various precedents referred to above, let me now turn to the text of the agreement dated 19.5.1973 which is the bed-rock of the dispute. The official translated version of the agreement reads as under.

Agreement

1.Shri V.S. Khandekar,
residing at 5, Rajarampuri. .. Party No.1

and

2. Shri R.J. Deshmukh, owner of
Deshmukh and Company, 739,
Budhwar Peth, Pune. .. Party No.2

. We, the undersigned No.1 and 2 make an agreement as under:

1. The Party No.1 out of us has written novels, short essays, annotations, stories,Edited books and the books edited under the name of viz. (1) Ulka (2) DonDhruva (3) Hirva Chafa (4) Don Mane (5) Pandhare

Dhag (6) Krounch Vadh (7) Yayati (8) Amrutwel (9) Rikama Devara (10) Sukhacha Shodh (11) Ashru (12) Marathicha Natyasagar. (other 60 books mentioned in the agreement are not relevant for the purpose of present case,hence not included/ reproduced herein) and

(2) the right to print and publish the same is given to the party No.2 out of us viz. Shri R.J.Deshmukh, owner of Deshmukh and Company..

3. The books from out of the said books, which will not be published by Party No.2 herein within the period of five years from today or the books which will be published in the said period but after its edition is sold out, if the party No.2 does not publish the said books within the period of next five years then, the party No.1 Shri V.S. Khandekar or after his death the person as provided by him in his deed of disposition, shall have right to publish the said books.

4. Shri Ram Jayawant Deshmukh, Deshmukh and Company shall have the right to publish the literature and company shall have the right to publish the literature of Shri V.S. Khandekar which will be published (i.e. the literature which is not complied despite being published) or remain unpublished after his death. However, if he refuses to publish the same, as authorised by Shri V.S.Khandekar his heirs or executors as provided in his deed of disposition, shall make arrangement to publish the same. Similarly, from out of the aforesaid literature which will be published, for novels 15% and for stories and all other literature 7 1/2% m royalty shall be paid wherein autobiography shall be the exception for which 15% royalty shall be paid for its first edition.

5. The party No.2 shall complete by the end of December every year the accounts as regards royalty of books, that would be published after the death of party No.1 herein, as per the said agreement and thereafter within three months the party No.2 shall send the amount of royalty, receivable from him to the children of party No.1 i.e. (1) Avinash Vishnu Khandekar (2) Mandakini Vishnu Khandekar (3) Sau. Kalpalata Vijay Khare 4) Sau. Sushila Chandrahas Kapadi, 5) Sau Supriya Shriram Pendharkar, in equal proportion.

6. From the books which will be published during the life time of Shri V.S. Khandekar, 15% royalty shall be paid on the printed price of the books that are sold very year and after his death, the persons entitled under his deed of disposition, shall be paid every year 7 1/2% royalty for story compilation and annotation and 10% royalty on the

printed sale price of novels and short essays.

7. The writer or Executors shall be given 25 copies as gift.

8. All the rights as regards translation of any book (per edition) in one more languages as well as as regards the cinema or drama conversion thereof shall be with V.S. Khandekar or his heirs under his deed of disposition.

9. In case of the books which are to be given free of cost or as gift for publicity purpose, the writer shall not get royalty on its price. However, the number of such books shall not be more than hundred. The account of number of such books given shall be furnished to the writer or Executors.

10. The rights acquired by Shri R.J.Deshmukh, owner of Deshmukh & Co. under this agreement shall come into effect after his death as per his deed of disposition.

. The said agreement is original and its true copy bearing the signatures of both the parties is kept with the party No.1 herein and the original is with party No.2. Thus, the agreement is given and taken in writing as above on the date 19.5.1973.

In handwriting of Mandakini Vishnu Khandekar."

Witnesses:

Sd/- V.S. Khandekar

1) Sd/-xxx

(Ranjeet Desai)

at present at Kolhapur.

Sd/- R.J. Deshmukh

at present at

Kolhapur.

19.5.1973.

63. Perusal of the aforesaid Agreement in general and Clause 1 in particular would clearly show no indication that the copy right in the literary work of Late Shri V.S. Khandekar was to remain the property of

Late Shri R.J. Deshmukh or that it was to become his absolute property.

64. Clauses 1 and 2 of the agreement any way do not indicate any exclusive right to print and publish in favour of late Shri R.J.Deshmukh. The said agreement does not whisper a single word like exclusive licence or copyright. It merely makes a mention of a licence to print and publish the book of Shri Khandekar.

65. Clause 3 of the agreement is indicative of the fact that within a period of 5 years, if the books by way of first edition are not published, then that right to print and publish shall revert back to the author. In the submission of the plaintiff-appellant this term could not be reconciled with the theory of license. On the contrary, it is indicative of the partial assignment of Copyright. It is no doubt true that some of the reported judgments do suggest that such clause is apt to bring out assignment. However, some of the reported cases have taken contrary view; one of such readily available judgment is in the case of K.P.M. Sunderam vs. M/s Rattan Prakashan Mandir AIR 1983 Del.461 (paras 15 and 16). In this case it has been ruled that resevation in the agreement amounts to only a publishing agreement and not the assignment partial or whole of any interest in the copyright. Such

agreement is to be treated as only a publishing licence. In cases of agreement between authors, publishers and sellers, it is sometimes difficult to determine whether it is an exclusive licence or partial assignment of copyright to publish and sell. This question can be determined only by interpretation of the document relating to the licence or assignment. This is particularly so in case of exclusive licence between authors and publishers. Though in case at hand there is no such difficulty, since there is no exclusive grant in favour of the publisher, however, while determining the nature of transaction, isolated clause cannot be taken into consideration,. The document as a whole is required to be read to spell out the correct nature of the transaction between the parties.

66. As already pointed hereinabove Clause 1 of the agreement does not provide for exclusive right in favour of Shri R.J.Deshmukh to print and publish. Absence of words such as, " their successor and assigns etc." are also indications contrary to the concept of partial assignment. In absence of grant of " sole and exclusive license" is also an additional factor to suggest that the agreement in question is merely a publishing agreement and could not be regarded as an assignment of copyright.

67. Two propositions in respect of commercial contracts are well recognised. Firstly, that there is no presumption in favour of permanence of an agreement. Secondly, if a contract involved mutual trust and confidence in its fulfilment, normally, courts would not interpret its term to employ permanence. In this case mutual reciprocal obligations are flowing from the terms of the agreement such as payment of royalty, giving of accounts, supply of copies to the author with restriction on the right of the publisher to distribute complimentary copies. If the consideration consists of payment of royalties or a share of profits instead of downright payment, then the copy right is not assigned. It would be a licence to publish and sell. In this case, payment of royalty instead of a sum of money paid down will also weigh heavily against partial assignment. In Copinger and Skone James on Copyright (9th Edition at page 384, it is observed:

> " But wherever there are continuous obligations on the part of the publisher- for instance, the payment of royalties to the author -the tendency of the Courts is to construe the agreement as conferring upon the publisher a conditional licence to publish rather than as giving him an equitable title to the copyright."

68. In this view of the scenario it is difficult to lean in favour of partial assignment. Applying these principles to the agreement in question, I am of the

clear view that the aforesaid agreement dated 17.5.1973 has created non-exclusive licence in favour of Shri R.J. Deshmukh.

69. Plaintiff has placed much reliance on clause 10 of the agreement which empowered Party No.2, Late Shri R.J. Deshmukh to transfer his right to print and publish through his Will. In order to consider whether really this clause gives unbridles powers to transfer in favour of R.J.Deshmukh and his transferee. In order to answer this issue one has to ask a question "Could Shri R.J. Deshmukh transfer his right so as to make it freely and unrestrictedly transferable by any person in whose hands such right might have been given"? Answer to this question has to be in the negative. A licence to print and publish contained in a agreement in question is of personal character and not assignable unless otherwise agreed; without the author's consent (See (127)2 K.B.543 at p.533). In this case, express permission was in favour of Shri R.J. Deshmukh only and not in favour of his transferee. This aspect has been rightly dealt with by the trial Court to rule that the right to transfer was given only in favour of R.J. Deshmukh under the agreement in question but no such right was given in favour of the transferee to make further transfers. In other words, it was a personal right given to Shri R.J. Deshmukh.

70. At this juncture, it will not be out of place to mention that if the agreement is silent about the term of copyright then such agreement is treated as publishing licence. Clause 9 materially limits rights to distribute complimentary copies. This clause is also one of the strong elements in the agreement which leans in favour of grant by way of licence. Where the author agrees to grant to the publisher the sole and exclusive licence to print, publish and sell his work, but reserves to him the copyright of such work, the agreement amounts to only a publishing agreement and not an agreement of assignment of copyright. In the case at hand, there is no exclusive grant to print and publish in favour of the publisher. Thus, reading the agreement as a whole in ordinary and natural way, I think there is neither transfer nor partial assignment of any exclusive right to print and publish the work of Late Shri V.S. Khandekar.

71. It appears from the evidence available on record that late Shri R.J. Deshmukh was well aware of the fact that he had only a licence to publish books of Shri V.S. Khandekar, which is evident from the endorsement made on one of the famous books "YAYATI" of late Shri Khandekar published by Shri Deshmukh wherein it is specifically mentioned that " All rights are reserved with the author". This piece of evidence is

virtually in the nature of admission which could have been explained by leading evidence had it been otherwise.

72. One more aspect needs reference. While deciding Regular Civil Appeal No. 40 of 1989, District Judge, Kolhapur, has recorded a clear finding in para 43 of the judgment that, ".....no copyright is assigned to the defendant by late Shri Khandekar...." This finding was recorded by the District Judge while determining the jurisdiction of the Court, as such this finding cannot be said to be without jurisdiction. Every Court has a jurisdiction to decide its own jurisdiction. It would, thus, not only bind the respondents but also the plaintiff-appellant herein; if they are claiming through Smt. Sulochanabai, who was a party to the suit. This finding would operate as res judicata.

73. It is alleged that Shri R.J. Deshmukh through his Will bequeathed his rights to print and publish the books under the agreement in favour of Smt. Sulochanabai. The document which is alleged to be the Will of Late Shri Deshmukh has not been produced on record. What was produced was the photo copy thereof. It was a secondary evidence . It has not been proved as per provisions of the Evidence Act. Apart from this, even if Will of Shri R.J. Deshmukh or Letter of

administration is seen, it is silent about transfer of his rights under the agreement. It is, therefore, clear that Smt. Sulochanabai never had any right or licence under the said agreement in her favour.

74. Apart from the above, assuming that the right was transferred in favour of Smt. Sulochanabai under the alleged Will of Shri Deshmukh, even then, there was no right in favour of Smt. Sulochanabai 'to further' transfer her alleged right in favour of other person. Assuming for the sake of argument that Sulochanabai had some transferable right (which she did not have), even then no such right has been transferred by her through her Will (which has also not been proved). Even the letter written by Smt. Sulochanabai dated 12.3.1996 has not been proved. It is also not clear as to whom that letter was addressed. If it is treated as Will then it has no witnesses. If it is treated as Letter then the question is to whom it was addressed. This letter or contents thereof for want of proof cannot be read. It does not create any right in favour of the plaintiff-company in any manner for more than one reason mentioned therein. Thus, taking overall view of the matter and weight of evidence no fault can be found with the view taken by the trial Court and the agreement in question in no way can be read as document of partial assignment as was canvassed by the appellant.

Issue No.4:
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75. So far as this issue is concerned, the Appeal Against Order takes exception to the order dated 20th March 2002 passed below Ex.5 in Copyright Suit No.1 of 2001 by the 5th Additional District Judge, Pune. Perusal of the impugned order would go to show that the trial Court has taken into account the entire material available on record and also considered terms and conditions incorporated in the agreement dated 19th May, 1973. The finding recorded by the Courts below are in consonance with the finding recorded by this Court in the instant judgment; while considering the validity of the judgment and decree passed by the trial Court in Civil Suit No.2 of 1998. The trial Court for the reasons recorded refused to grant interim relief in favour of the plaintiff.

76. Law of injunction is well settled that granting or refusing to grant temporary injunction is governed by three well established principles, (a) Whether prima facie case has been made out; (b) Whether balance of convenience is in their favour; and (c) whether petitioner will suffer irreparable injury if the temporary injunction is not granted. The party who seeks aid of injunction must show that the act

complained of is in violation of his rights and whether there is fair and substantial question to be decided by the parties and there is bonafide contention between the parties. If such contentions are available, then relief needs to be granted. It then becomes the duty of the Court to consider the material placed before granting or refusing to grant injunction and consider the documents if any, before an interim relief can be passed. The prima facie case does not mean a case to succeed but which fairly needs an enquiry. At the same time, while granting interim relief the Court has also to take into account whether the interim relief is claimed in the aid of final relief so as to maintain status-quo ante or to preserve status of parties.

77. Keeping aforesaid principles in mind, if one turns to the case in hand, prima facie, it is not in dispute that the trial Court had taken survey of the terms and conditions of the agreement. The trial Court had also referred to two verdicts of two different Courts dealing with identical controversy which was involved in the suit. The trial Court, after taking into accounts these aspects, has come to the conclusion that no prima facie case has been made out and no balance of convenience was in favour of the plaintiff and that the plaintiff would not suffer any injury on account of refusal to grant interim injunction. Perusal of the impugned order would also show that the

trial Court applied its mind and passed a reasoned order. The view taken by the trial Court is a reasonable and possible view.

78. While considering the appeal against order, another question which needs to be addressed is: What is the jurisdiction of the appellate Court while considering the appeal against the order of injunction.In dealing with the matter raised before it at the appellate stage, the appellate Court would normally not be justified in interfering with the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion. In this behalf, it would be profitable to refer to the observations made by the Apex Court in the case of **Wander Ltd. and anr. vs. Antox India P.Ltd. 1990 (Supp) SCC 727**, as follows:

> "The appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant of refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion."

Keeping the aforesaid parameters of the appellate jurisdiction in mind, and after examining the order impugned, I have no hesitation to record a finding that the discretion has been exercised by the trial Court reasonably and in judicial manner. The view taken by me while considering and deciding the appeal is in consonance with the view taken by the trial Court. In this view of the matter, there is absolutely no case made out by the appellant to interfere with the order passed by the trial Court refusing to grant injunction. In these facts and circumstances, the plaintiff-appellant was and is not entitled to claim interim relief of injunction pursuant to prayers in Suit No.1 of 2001. The Appeal from Order thus fails.

79. For the above reasons, both the appeals are

dismissed with no order as to costs.

80. At this stage, learned Counsel for the appellant prayed for continuance of the ad-interim order, granted in First Appeal No.276 of 2001 dated 16.4.2001 and further continued by an order dated 7.8.2001, for a further period of 8 weeks.

. This prayer is opposed by the learned Counsel appearing for the respondents.

. Having heard the parties, I see no justification in rejecting this prayer made by the learned Counsel for the plaintiff-appellant especially, when the interim relief operated between the parties almost for a period of 3 1/2 years. No prejudice would be caused to the respondents, if it is extended for a further period of 8 weeks from today.

. In the above view, ad-interim relief granted on 16.1.2001 and further continued by an order dated 7.8.2001 shall continue to operate for further period of 8 weeks i.e. upto 30.6.2005.